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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 ROBERT S. DUNCAN,

12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE, Commissioner of
Social Security Administration,

15 Defendant.
16

CASE NO. C09-5187BHS

REPORT AND RECOMMENDATION

Noted for March 5, 2010

17
18 This matter has been referred to Magistrate Judge J. Richard Creatura pursuant to 28
19 U.S.C. § 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews,
20 Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). This matter has been briefed. Oral
21 argument was considered on February 9, 2010. After considering the argument and reviewing
22 the record, the undersigned recommends that the Court affirm the administrative decision.

23 INTRODUCTION AND PROCEDURAL HISTORY

24 The primary issues in this case revolve around the utter absence of any medical testimony
25 regarding plaintiff's alleged disability and residual function capacity from 1991 to December of
26 1996. Since the ALJ relied primarily on plaintiff's own uncontradicted testimony regarding

1 plaintiff's disability and residual functional capacity during this period of time, the ALJ's
2 conclusions should not be disturbed on appeal.

3 Plaintiff Robert Duncan was born in 1956. Tr. 243. Plaintiff has had two significant
4 jobs, both occurring in California. First, he was employed by a small family-owned business,
5 where he helped in the manufacture of playground equipment for over seven years. Tr. 444. He
6 worked up to a foreman position. Id. The second job he had was at a hospital, where he worked
7 as a maintenance supervisor. Tr. 443. Plaintiff worked at the hospital for a relatively short time
8 (six to nine months), before he moved with his family up to Washington. Tr. 443-44. Plaintiff
9 testified that back pain interfered with both jobs. Tr. 443. He explained that he initially hurt his
10 back in an accident while participating in demolition derby. Tr. 441-43.

12 Plaintiff has not worked since his job at the hospital, and his back pain and medical issues
13 have increased. Plaintiff filed an application for both supplemental security income benefits and
14 Title II disability social security benefits in August and September of 2004. Tr. 39. Plaintiff
15 alleged disability since June 1, 1991, due to back pain associated with a herniated disc. Tr. 57-
16 61, 432.

18 A few months after filing his applications for social security benefits, plaintiff was taken
19 to the emergency room by his family as they had observed that plaintiff had "altered levels of
20 mental status or levels of consciousness" over the last month. Tr. 239. Plaintiff was admitted to
21 the intensive care unit at the hospital with a diagnosis of acute and chronic respiratory failure,
22 exacerbation of chronic obstructive pulmonary disease, probable pneumonia, cardiac arrhythmia,
23 probable heart failure, probable obstructive sleep apnea syndrome, and probable obesity
24 hypoventilation syndrome. Tr. 230, 245. After several weeks, he was transferred to an extended
25 care facility for rehabilitation, and he was released in February, 2005. Tr. 217. He was re-
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1 hospitalized a month later, as he had not been complying with the treatment recommendations
2 and had a second episode of acute respiratory failure. Tr. 211-12. Several weeks later, he was
3 again discharged to an extended care facility for rehabilitation. Tr. 200.

4 On September 6, 2005, based on this evidence, the administration granted plaintiff's
5 application for supplemental security benefits. Plaintiff was determined to be unable to work,
6 due to severe morbid obesity (weighing in excess of 400 pounds) and pickwickian syndrome.
7 Defendant's Brief at 4, Tr. 383. However, the administration found insufficient evidence to
8 establish that plaintiff was disabled prior to 1996. Tr. 383. Plaintiff's request for disability
9 benefits was therefore denied.

11 Based on plaintiff's work record, he is eligible for disability insurance benefits only if he
12 is able to establish that he became disabled on or before December 31, 1996. Tr. 53.
13 Accordingly, the relevant time period to determine if plaintiff is entitled to disability benefits is
14 June 1, 1991, plaintiff's alleged onset date, through December 31, 1996, plaintiff's date last
15 insured (sometimes referred to as "DLI" in the record).

17 After initial denial, the matter was assigned for further review by an ALJ, who conducted
18 a hearing on March 4, 2008. Tr. 428-64. At the hearing the ALJ heard testimony from plaintiff,
19 Clarie Duncan (plaintiff's wife), and a vocational expert. There was a noticeable lack of medical
20 evidence during the period in question, largely due to plaintiff's decision not to seek medical
21 help during this period because of lack of funds. As a consequence, the ALJ was required to rely
22 largely upon plaintiff's own testimony to determine the extent of plaintiff's disability and
23 residual function. During the period in question, plaintiff testified that despite his back pain, he
24 was able to sit three to five hours without having a problem. Tr. 437. Plaintiff further stated that
25 he would have been able to stand 45 minutes to an hour without needing to lean on something
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1 and that he could walk about a block before needing to sit down. Tr. 437-48. Plaintiff told the
2 ALJ that he was able to lift 50 to 60 pounds at a time in a safe manner and that he did not have
3 any limitation in using his hands. Tr. 438. Plaintiff believed that he weighed approximately
4 240-260 pounds prior to December 2006. Tr. 439-40. His weight increased to 400 pounds after
5 this date, apparently exacerbating his problems.

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7 On June 12, 2008, the ALJ issued her decision, finding plaintiff was not entitled to
8 disability benefits. Tr. 18-25. The ALJ found plaintiff had severe impairments, but through the
9 date last insured (December 31, 2006), the ALJ found plaintiff had retained the ability to perform
10 light to medium work. Tr. 20-24. Based on the testimony of the vocational expert, the ALJ
11 concluded plaintiff was not disabled because he was able to perform several different jobs within
12 the national economy during the relevant time period. Tr. 24-25.

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14 Plaintiff appealed the ALJ's decision to the administration's Appeals Council, Tr. 13-14,
15 but his request for review was denied. Tr. 4-7. Accordingly, the ALJ's decision is the final
16 administrative decision, subject to judicial review. 20 C.F.R. §§ 404.981, 422.210.

17 On April 6, 2009, plaintiff filed the instant Complaint with the court. Plaintiff challenges
18 the ALJ's decision, raising the following claims in his Amended Opening Brief (Doc. 18):

- 19 (1) The ALJ allegedly erred in her assessment of plaintiff's credibility and the lay
20 evidence;
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22 (2) The ALJ allegedly failed to properly determine the onset date of plaintiff's disability;
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24 (3) The ALJ allegedly failed to properly assess the significance of plaintiff's obesity; and
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26 (4) The ALJ allegedly erred in her assessment of plaintiff's residual functional capacity
("RFC").

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Plaintiff bears the burden of proving that he or she is disabled within the meaning of the Social Security Act (the “Act”). Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999). The Act defines disability as the “inability to engage in any substantial gainful activity” due to a physical or mental impairment that has lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Plaintiff is disabled under the Act only if his or her impairments are of such severity that he or she is unable to do her previous work, and cannot, considering his or her age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

DISCUSSION

1. The Medical Evidence And Testimony Properly Support The ALJ's Finding That Plaintiff Has Failed To Show He Was Disabled On Or Before December 2006

Eligibility for disability insurance benefits under Title II of the Social Security Act is premised on the establishment of disability during a period that an individual is insured. 42 U.S.C. § 416(I)(3); Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). The claimant has the burden of proof, although the ALJ must assist in developing the record. Armstrong v. Comm'r of Social Security, 160 F.3d 587, 589 (9th Cir. 1998). Discussing application of Social Security Regulation ("SSR") 83-20, the Ninth Circuit held that where the record is ambiguous as to the onset date of disability, the ALJ must call a medical expert to assist in determining the onset date. Id. at 590. The Court explained that the ALJ is not required to be an advocate, but she must create a record that properly supports the basis for her findings and that calling a medical expert is one way of fulfilling this responsibility. Id.

Here, the record was sufficiently developed and complete; the ALJ did not need to call a medical expert to further develop the record as alleged by plaintiff. Since the information relied upon by the ALJ was largely from plaintiff, and was not ambiguous, and that the ALJ believed to be credible, there was no reason to call a medical expert to assist in determining the onset day.

A review of the record reflects the ALJ's and plaintiff attorney's efforts to obtain all the documentary evidence that could possibly shed light on plaintiff's physical condition prior to December 2006. The ALJ emphasized the importance of obtaining any relevant medical records, including forms completed by Dr. Lou. Tr. 431. The parties agreed that there were no medical records from when plaintiff stopped working in California until he was examined by doctors at Kaiser several years later. Therefore, there is no medical evidence during the relevant period.

Tr. 432. Plaintiff's attorney wrote a letter to the ALJ, dated December 2007, attaching medical

1 records from Kaiser Permanente dated 8/18/97 to 10/20/97. Tr. 100. Plaintiff's attorney
2 explained that these records were "offered for the purpose of establishing disability as of Mr.
3 Duncan's Date Last Insured, 12/31/96." Id. Plaintiff currently acknowledges that only fifteen
4 pages of medical records in the file (Tr. 398-412, consisting of the records from Kaiser noted
5 above) are dated in the 1990's; otherwise all of the medical evidence in the record is dated from
6 2004 and 2005. Amended Opening Brief at 12.

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8 The medical evidence from Kaiser Permanente, dated August through October 1997, in
9 combination with plaintiff's testimony provided a clear record for the ALJ to make her decision.
10 The ALJ first relied upon the Kaiser physicians (Dr. Luh and Dr. Francis) to find that plaintiff
11 suffered from obesity and mild radiculopathy secondary to disc protrusion. Tr. 20. Assessing
12 plaintiff's residual functional capacity, the ALJ analyzed the medical evidence, writing the
13 following summary:

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15 There is no medical evidence prior to the claimant's date last insured. He
16 requested a disability evaluation for back pain on September 2, 1997 (Exhibit
17 5F/13). This was done by Dr. Luh on September 8, 1997. As previously noted,
18 Dr. Luh suspected that the claimant's low back pain was related to obesity. Dr.
19 Luh added that it was "unlikely to get disability for this." (Exhibit 5F/12).

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21 A magnetic resonance imaging (MRI) of the lumbar spine was obtained, and Dr.
22 Luh referred the claimant to a neurosurgeon [Dr. Francis] for evaluation (Exhibit
23 5F/9). The MRI report on September 29, 1997, noted left lateral L5-S1 disc
24 protrusion causing narrowing of the left L5-S1 neural foramen, and apparently,
25 compression of the existing left L5 nerve root (Exhibit 5F/3).

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The neurosurgeon reviewed the results of the MRI and examined the claimant on
October 20, 1997. He reported the claimant ambulated in a normal fashion
without evidence of disturbance. He was able to climb on to the examination
table without difficulty. On exam, he had normal lumbar lordosis, no tenderness
to the paravertebral muscles or the interspinatus ligament. Palpation over the left
sciatic notch elicited pain. Range of motion of the lumbar spine was full in all
directions. However, at the extremes of flexion, the claimant alleged he had
increased left buttock discomfort. Deep tendon reflexes were 2/2 at the knees and
ankle jerks, bilaterally. Motor was 5/5. Straight leg raising test was negative
bilaterally. Plantar responses were downgoing. He was able to heel-toe walk

1 without difficulty. Dr. Francis' impression was the claimant had *mild* left S1
2 radiculopathy secondary to disc protrusion, left L5-S1. He recommended the
3 claimant for conservative treatment, including physical therapy and anti-
inflammatories. (Exhibit 5F/2). There is no evidence that he underwent physical
therapy or any other form of treatment.

4 Michael P. Carrol, MD., completed an evaluation form for the claimant for
5 purposes of obtaining eligibility for general services. The claimant's
6 representative interprets Dr. Carroll's statement to mean that the claimant could
7 not work. However, this was related to his back, and Dr. Carroll actually deferred
8 opinion until the claimant saw neurosurgeon. He said pain was a limitation, and
9 did not specify how limiting. Particularly, he answered "unknown" to the
10 question about whether treatment would restore the claimant's ability to perform
11 at least half-time in a normal day, and deferred any opinion on duration to
12 neurosurgeon (Exhibit 6F/2). State of Washington decided that the claimant
13 could not work, but it was not specific. As previously noted, the neurosurgeon
said the claimant walked without gait disturbance. He could move without
difficulty. He described only mild radiculopathy and advised conservative
treatment with physical therapy and anti-inflammatories. This is the extent of the
medical evidence of record. Regarding the neurosurgeon's recommendations, he
seemed to suggest the claimant would be able to return to function without
surgical intervention rather than requiring long-term limitations of disability.

14 Tr. 22-23.

15 At the administrative hearing, plaintiff testified regarding his physical abilities prior to
16 December 2006. The ALJ specifically referred to the neurologist's observations and asked
17 plaintiff if sitting for a long period was a problem and how long plaintiff was able to sit. Tr. 436-
18 37. Plaintiff stated that he was able to sit three to five hours without having a problem. Tr. 437.
19 Plaintiff further stated that he would have been able to stand 45 minutes to an hour without
20 needing to lean on something and he could walk about a block before needing to sit down. Tr.
21 437-48. Plaintiff told the ALJ that he was able to lift 50 to 60 pounds at a time in a safe manner
22 and that he did not have any limitation in using his hands. Tr. 438. Plaintiff believed that he
23 weight approximately 240-260 pounds prior to December 2006. Tr. 439-40. Although there is
24 some minimal testimony from plaintiff's wife and an undated letter from his daughter, this
25 evidence sheds almost no light on plaintiff's residual functioning capacity during the period in
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1 question. Therefore, plaintiff's testimony is uncontradicted and unambiguous, but entirely
2 unsupported by medical evidence.

3 Relying on the evidence noted above, the ALJ stated, "In conclusion, based on the
4 claimant's subjective allegations of back and left leg pain prior to his date last insured, and the
5 mild findings reported in 1997, he was limited as described in the above assessments of his
6 residual functional capacity." Tr. 24. The evidence properly reflects the ALJ's RFC, which was
7 assessed as follows:
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9 He could sit eight hours in an eight-hour workday with normal breaks. He could
10 stand for six hours in an eight-hour workday with the following restrictions: 30
11 minutes in a stationary position or merely taking a step of [sic] two, and up to one
12 hour if he could lean on something. He could walk one block. He could lift a
13 maximum of 50 to 60 pounds but no more than 10 pounds constantly. He was
14 unable to bend, climb, squat, and kneel. He should avoid reaching overhead. He
15 was able to push and pull within the pounds indicated, including up to 10 pounds
16 constantly. He had no other manipulative limitations. He had no visual or
17 communicative limitations. He should have avoided hazards and vibrations. He
18 was able to get along with people, follow instructions, and concentrate without
19 significant limitations

20 Tr. 21.

21 In sum, the ALJ properly relied upon substantial evidence of record to conclude that
22 plaintiff retained the ability to work during the relevant period. The record was sufficiently
23 complete and unambiguous, and thus, the ALJ did not need to call a medical expert to help
24 determine or make any inferences regarding plaintiff's capabilities prior to the 1997 medical
25 records.
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23 **2. *The ALJ Properly Assessed Plaintiff's Subjective Statements and The Lay Witness 24 Evidence***

25 Credibility determinations are particularly within the province of the ALJ. Andrews, 53
26 F.3d at 1043. Nevertheless, when an ALJ discredits lay witness testimony concerning a claimant's
ability to work the ALJ must provide reasons "that are germane to each witness." Nguyen v. Chater,

1 100 F.3d 1462, 1467 (9th Cir.1996). The reasons “germane to each witness” must be specific. Stout
2 v. Comm'r, 454 F.3d 1050, 1054 (9th Cir.2006)(explaining that “the ALJ, not the district court, is
3 required to provide specific reasons for rejecting lay testimony”).

4 Plaintiff argues that the ALJ improperly assessed plaintiff’s credibility and the credibility of
5 the lay evidence. Amended Opening Brief at 12. As shown above, the ALJ did not reject any
6 specific allegation made by plaintiff. In contrast, it is clear that the ALJ relied heavily on the
7 plaintiff’s testimony at the hearing to fashion plaintiff’s RFC. Plaintiff interprets the testimony to
8 include the additional need to lie down to alleviate his pain, which is not part of the ALJ’s RFC.
9 Opening Brief at 3, 14. A review of the testimony in whole does not support the different
10 interpretations. In context, the testimony regarding plaintiff’s need to lie down is in direct response
11 to his attorney’s questions about a time in 1997 when he had insurance benefits, which allowed him
12 the opportunity to see the medical providers at Kaiser Permanente. Tr. 445-46. It is not inconsistent
13 with the ALJ’s reliance on plaintiff’s earlier testimony, which was incorporated into the RFC and
14 accommodates plaintiff’s need to switch positions to alleviate pain in his lower back. The court does
15 not find any merit in plaintiff’s argument that the ALJ erred by rejecting plaintiff’s testimony or
16 limited his credibility.

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18 Next, plaintiff argues the ALJ erred when she failed to make any credibility assessment
19 regarding the lay evidence provided by plaintiff’s wife and plaintiff’s daughter. Amended Opening
20 Brief at 15-16. The ALJ specifically considered Ms. Duncan’s testimony and the written statements
21 from Ms. Burgess in her written decision. Tr. 22-23. The opinions of both lay witnesses are not
22 inconsistent with plaintiff’s own testimony regarding the history of events that lead to plaintiff’s
23 eventual disability. The ALJ properly focused on the relevant time period when she considered their
24 statements. The ALJ did not specifically reject or accept the statements of Ms. Duncan, but the ALJ
25 stated the following regarding Ms. Burgess:
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1 While these statements do not refer to limitations beginning prior to the claimant's
2 date last insured, the undersigned finds some of these restrictions may have been
3 applicable in consideration of his subjective allegations of low back pain prior to his
4 date last insured. Accordingly, restrictions in sitting, standing and walking as well as
5 postural limitations have been included as part of the undersigned's assessment of
6 claimant's residual functional capacity. There is no adequate objective basis to
7 assign other limitations.

8 Tr. 23.

9 In sum, the ALJ properly addressed the lay witness statements. The ALJ properly relied
10 upon the medical evidence produced in 1997, along with plaintiff's testimony regarding his
11 physical abilities during the relevant time period to formulate a RFC. The lay evidence does not
12 support a deviation from that finding. The court finds no error in the ALJ's treatment of the
13 statements from plaintiff, plaintiff's wife, or plaintiff's daughter.

14 **3. *The ALJ Properly Evaluated Plaintiff's Obesity***

15 Plaintiff argues that the ALJ found obesity as a severe impairment, but she failed to factor
16 in or further discuss plaintiff's obesity. Amended Opening Brief at 23. The court finds no merit
17 to this argument.

18 As discussed above, the court found no error in the ALJ's consideration of the medical
19 opinions and plaintiff's testimony with respect to his physical condition and abilities during the
20 relevant time period. Dr. Lou opined that plaintiff's low back pain was caused by his obesity,
21 and the ALJ specifically relied upon Dr. Lou's opinion and assessment of plaintiff's condition.
22 In further consideration of plaintiff's obesity, the ALJ found that plaintiff could only walk one
23 block and that he could only stand for thirty minutes in a stationary position and stand for one
24 hour if he could lean on something. The ALJ also found that he was unable to bend, squat, and
25 kneel. Tr. 21. These restrictions were directly related to plaintiff's low back pain and obesity
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1 during the relevant period. From this record, it is clear that the ALJ properly considered
2 plaintiff's obesity.

3 **4. *The ALJ Properly Evaluated Plaintiff's Residual Functional Capacity at Step-Three***

4 "[R]esidual functional capacity" (RFC) is "the maximum degree to which the individual
5 retains the capacity for sustained performance of the physical-mental requirements of jobs." 20
6 C.F.R. § 404, Subpart P, App. 2 § 200.00(c) (emphasis added). In evaluating whether a claimant
7 satisfies the disability criteria, the Commissioner must evaluate the claimant's "ability to work on
8 a sustained basis." 20 C.F.R. § 404.1512(a). The regulations further specify: "When we assess
9 your physical abilities, we first assess the nature and extent of your physical limitations and then
10 determine your residual functional capacity for work activity on a regular and continuing basis."
11 Id. at § 404.1545(b). If the RFC assessment conflicts with an opinion from a medical source, the
12 adjudicator must explain why the opinion was not adopted. 20 CFR §§ 404.1527, 416.927.
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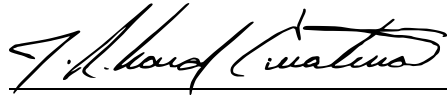
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15 Plaintiff's RFC was assessed as noted above. After reviewing the record, the
16 undersigned finds the ALJ's RFC finding is properly supported by substantial evidence. The
17 medical evidence relied upon by the ALJ supports the RFC assessment. The ALJ properly
18 considered the relevant medical evidence regarding plaintiff's obesity and the credibility of
19 plaintiff and the lay witnesses. Accordingly, the court rejects plaintiff's assertion that the ALJ
20 erred in her RFC assessment.
21

22 **CONCLUSION**

23 Based on the foregoing discussion, the Court should affirm the administrative decision.
24 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the
25 parties shall have fourteen (14) days from service of this Report to file written objections. *See*
26 *also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for

1 purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit
2 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on March 5, 2010,
3 as noted in the caption.

4 DATED this 10th day of February, 2010.

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7 J. Richard Creatura
8 United States Magistrate Judge
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